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No. 05-381

IN THE

Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), the Court held that an antitrust plaintiff alleging predatory pricing must prove that the defendant (1) sold its product at a price level too low to cover its costs and (2) had a dangerous probability of recouping its losses once the scheme of predation succeeded.

The question in this case is whether a plaintiff alleging predatory *buying* may, as the Ninth Circuit held, establish liability by persuading a jury that the defendant purchased more inputs "than it needed" or paid a higher price for those inputs "than necessary," so as "to prevent the Plaintiffs from obtaining the [inputs] they needed at a fair price"; or whether the plaintiff instead must satisfy what the Ninth Circuit termed the "higher" *Brooke Group* standard by showing that the defendant (1) paid so much for raw materials that the price at which it sold its products did not cover its costs and (2) had a dangerous probability of recouping its losses.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared as *amicus curiae* in this and other federal courts to

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

address the proper scope of the antitrust laws. *See, e.g., Texaco v. Dagher*, No. 04-805 (U.S., dec. pending); *Illinois Tool Works Inc. v. Independent Ink, Inc.*, No. 04-1329 (U.S., dec. pending); *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 298 (2004); *3M Co. v. LePage's, Inc.*, 124 S. Ct. 2932 (2004).

WLF believes that the object of the antitrust laws should be to promote competition and thereby provide consumers with better goods and services at lower prices. Accordingly, producers who compete vigorously -- whether by lowering their prices or offering to pay whatever price is necessary to obtain desired inputs -- should generally be applauded. The antitrust laws do, of course, prohibit "predatory" price decreases and "predatory" buying whose effect is to lessen future competition. But the types of business activities that are condemned as "predatory" must be very clearly defined, or otherwise producers will be dissuaded from engaging in vigorous price and buying competition (the very types of conduct that should be encouraged by the antitrust laws) by the threat that such conduct may cause them to incur antitrust liability. WLF fears that the Ninth Circuit's decision, if allowed to stand, will lead to just such a chill in competition because it deprives producers of any clear standards for acceptable buying behavior.

WLF has no direct financial interest in the outcome of this case. It is filing due solely to its interest in ensuring that the antitrust laws are used to promote competition, not to protect less-efficient producers against competition. WLF is filing this brief with the consent of all parties. The written consents have been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

Petitioner Weyerhaeuser Co. is the dominant firm in the market defined for purposes of this case: the purchase of alder sawlogs in the Pacific Northwest. Respondent Ross-Simmons Hardwood Lumber was also a purchaser in that market until it went out of business in 2001.[2] Ross-Simmons sued Weyerhaeuser for monopolization and attempted monopolization of the market, in violation of § 2 of the Sherman Act, 15 U.S.C. § 2.

Ross-Simmons alleged that, during the relevant "predation" period (1998 to 2001), Weyerhaeuser artificially increased sawlog prices to drive Ross-Simmons and other competitors out of business. As found by the courts below, the purpose of this scheme was *not* to monopolize finished hardwood lumber sales,[3] but to monopolize alder sawlog purchases. Ross-Simmons alleged that once it had driven other buyers out of the market, Weyerhaeuser planned to recoup its losses by using its monopsony power to drive down future prices paid to log suppliers. As part of its scheme, Weyerhaeuser was alleged to have used its increased supply of logs to increase production and *decrease* prices; and indeed, the Ninth Circuit found that during the alleged predation period, the price of finished lumber fell. Pet. App. 10a n.16.

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[2] Both Weyerhaeuser and Ross-Simmons operated sawmills; they purchased alder sawlogs for the purpose of processing them into finished hardwood lumber.

[3] Weyerhaeuser produces only 3% of finished hardwood lumber sold in North America. Pet. 4 n.2. The jury found that because alder competes with other hardwoods, the relevant sales market consists of *all* hardwood lumber sales. Under those circumstances, Weyerhaeuser cannot possibly exercise market power in connection with its sales.

Ross-Simmons alleged that Weyerhaeuser engaged in several types of anticompetitive conduct to carry out its scheme. However, in upholding the verdict for Ross-Simmons, the Ninth Circuit relied entirely on a finding that there was "substantial evidence" that "Weyerhaeuser engaged in anticompetitive conduct by overbidding for sawlogs." *Id.* 18a.

Weyerhaeuser argued that Ross-Simmons should not have prevailed because Ross-Simmons failed to present evidence that: (1) Weyerhaeuser paid so much for alder sawlogs that the price at which it sold its finished lumber did not cover its costs; and (2) it had a dangerous probability of recouping its losses by forcing prices down after driving other buyers out of the market. Weyerhaeuser argued that this Court established those evidentiary requirements for all predation cases in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). The Ninth Circuit disagreed, holding that the *Brooke Group* requirements apply in predatory pricing cases but not in predatory buying cases. *Id.* 5a. The court reasoned that *Brooke Group* had established those strict requirements in predatory pricing cases because of its recognition that price cuts benefit consumers and foster competition and thus should almost always be encouraged. *Id.* at 8a. The court stated that, in contrast, "benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing." *Id.* at 9a.

The court conceded that "in some situations rising input prices might encourage new companies to enter the supply side of the market and expand output, thereby increasing innovation and efficiency so that consumers benefit in the long run through price decreases and product improvements." *Id.* 11a. But the court insisted that "at least in this case" such benefits to consumers were unlikely because, the court said, "[t]he nature

of the input supply at issue here does not readily allow for market expansion." *Id.*

The court held that the jury had been properly instructed regarding the standards for determining whether Weyerhaeuser had engaged in anticompetitive conduct in violation of § 2 of the Sherman Act. The jury was instructed that anticompetitive acts included purchasing "more logs than it needed," and paying a higher price than "necessary," in order to prevent Ross-Simmons from obtaining logs at a "fair" price. *Id.* at 14a n.30.

REASONS FOR GRANTING THE PETITION

This case presents an issue of exceptional importance to thousands of companies throughout the United States: whether their buying policies can be condemned as predatory under the antitrust laws despite uncontested evidence that their prices are sufficient to cover their costs. Companies know that they can engage in aggressive *price* competition without fear of antitrust repercussions, provided only that they do not sell below costs. But if the Ninth Circuit's decision is allowed to stand, that safe harbor will not extend to *buying* competition. They will be unable to design their buying activities – particularly, buying designed to facilitate expansions in capacity or to meet competition from a new market entrant – in such a way as to preclude future antitrust liability based on claims that they engaged in predatory conduct.

Review is warranted because the uncertainty created by the decision below will chill competition among producers who seek to avoid possible antitrust liability. That chill in competition cannot be good for consumers, who rely on competition to hold down prices of, and improve the quality of, the goods and services they purchase. Indeed, avoiding such a chill was a principal basis for this Court's *Brooke Group*

holding that above-cost pricing is not actionable under the antitrust laws. The Ninth Circuit has now held, contrary to the Fifth Circuit, that *Brooke Group* standards are inapplicable to predatory buying. The Court should grant review to resolve that conflict.

Review is also warranted because of the need for the Court to take steps to prevent the antitrust laws from being used as a tool by inefficient producers to protect themselves from competition from their more efficient rivals. Antitrust scholars have long warned against permitting the antitrust laws to be hijacked in this manner. WLF is concerned that the Ninth Circuit decision, by exposing firms to whole new avenues of antitrust challenge, will facilitate efforts by inefficient producers to stymie aggressive competition.

I. THE DECISION BELOW THREATENS TO CHILL COMPETITION BY DEPRIVING PRODUCERS OF A BRIGHT-LINE RULE THAT ALLOWS THEM TO PURCHASE AGGRESSIVELY WITHOUT FEAR OF ANTITRUST LIABILITY

This Court recognized in *Brooke Group* that, as a theoretical matter, above-cost price reductions might inflict injury to competition. *Brooke Group*, 509 U.S. at 223. The Court was nonetheless unwilling to impose antitrust liability in such situations because doing so would "court[] intolerable risks of chilling legitimate competition." *Id.* The Court stated that imposing liability on a producer that was not engaged in predatory pricing is "especially costly" to competition because doing so "'chill[s] the very conduct the antitrust laws are designed to protect.'" *Id.* at 226 (quoting *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 122 n.17 (1986)). *See also Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 594 (1986). In essence, the Court determined that so long

as a company is covering its costs, harm from "false negatives" (failures to detect anticompetitive conduct) is far outweighed by the harm caused by "false positives" (imposing liability on non-predatory activity).

The danger is equally grave that fear of antitrust liability will chill aggressive competition in the purchase of inputs. Companies that do business in any of the nine States comprising the Ninth Circuit (and virtually every large company in this country does so) are now subject to the Ninth Circuit's amorphous predatory buying standards, which allow imposition of massive liability ($79 million in this case) based on a jury's determination that a company purchased more inputs "than it needed," or paid a higher price for those inputs "than necessary." No company can predict in advance what prices a jury will deem higher than necessary. The only rational response by a dominant firm to such standards is to cease competing aggressively in its purchases, rather than risk the possibility that a jury will determine after-the-fact that the firm was not being "fair" to its competitors.

Surprisingly, the Ninth Circuit simply ignored the potential chilling effect of its ruling. Rather, it sought to downplay the harm to competition that might be caused by its expansive antitrust liability standard, by denigrating the value of such competition in the buying context: "benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing." Pet. App. 9a. Even accepting the validity of that assessment (an assessment not shared by leading economists, as the Petition well documents), it does not justify adoption of an amorphous liability standard that deprives companies of the ability to differentiate acceptable from unacceptable buying practices. The Ninth Circuit's assessment might justify adoption of an antitrust standard that is somewhat broader than

the one articulated in *Brooke Group*;[4] but it does not justify an antitrust standard that deprives companies of any clear guidance regarding buying practices. Review is warranted to eliminate the confusion brought about by the Ninth Circuit's amorphous standard, by replacing it with one that will allow companies to adopt buying strategies that they can be confident do not violate the antitrust laws.

The Ninth Circuit's ruling is particularly problematic because it establishes a standard that, by the court's own admission, does not necessarily apply in all predatory buying cases. The Court admitted that in *other* situations involving alleged predatory buying, an aggressive buyer's actions might have significant pro-competitive effects because they might:

> [E]ncourage new companies to enter the supply side of the market and expand output, thereby increasing innovation and efficiency so that consumers benefit in the long run through price decreases and product improvements.

Pet. App. 11a. The Court insisted, however, that those pro-competitive effects were not possible in the alder sawlog market because the nature of the input supply did not "readily allow for market expansion." *Id.* Thus, rather than providing a standard applicable to a broad range of buyer activity, the Ninth Circuit hinted that its standard might be applicable this one time only -- or maybe not. *Id.* ("Therefore, the standard for liability *in this predatory bidding case* need not be as high as in predatory pricing cases.") (emphasis added). Such opaque standards only

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[4] For example, courts might decide to adopt a stricter standard regarding what it means to be selling a product above cost in a case involving predatory buying allegations than in a case involving predatory pricing allegations.

add to the confusion faced by the business community and heighten the urgency of the need for review by this Court.

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH ANOTHER [A]PEALS COURT DECISION AS WELL AS MOST [M]ODERN ECONOMIC THOUGHT

Review is also warranted because the Ninth Circuit's decision is badly out of step with recent decisions of this Court and the views of almost all antitrust scholars. As Petitioner aptly states, "the Ninth Circuit's repudiation of the *Brooke Group* standard in cases alleging predatory buying resurrects an antitrust dinosaur that this Court's decisions should have rendered extinct." Pet. 7.

WLF will not repeat the Petition's cogent explanation of why the Ninth Circuit's holding constitutes such a sharp departure from controlling antitrust principles. Rather, WLF wishes to add several observations regarding what it views as the court's misguided application of economic policy.

First, the Ninth Circuit was wrong to suggest that the actions of an aggressive buyer (a description that can accurately describe both a company that is acting procompetitively and one that is engaging in predatory buying) provide little if any immediate benefits to consumers. A company that overbids for inputs has every incentive to make productive use of those inputs, assuming that it is selling into a competitive market. Thus, overbidding for inputs will lead to increases in production, which in turn will tend to decrease prices – a result that is decidedly of benefit to consumers. Indeed, that is precisely what Ross-Simmons alleged happened in this case, and what the Ninth Circuit found to have happened. Pet. App. 10a n.16. The Ninth Circuit said that the price decreases might

have been caused by reasons unrelated to Weyerhaeuser's conduct, *id.*, but it is undeniable that any effect caused by Weyerhaeuser's conduct could only have been positive.

The Ninth Circuit also suggested that price decreases during the predation period may actually be bad for consumers because "a reduction in prices would place even greater pressure on competitors, thereby increasing the threat to competition arising from predatory bidding." *Id.* 10a. That mode of analysis was directly repudiated by this Court in *Brooke Group*. It is uncontested that at all times Weyerhaeuser sold its finished lumber at prices in excess of costs, however measured. Under those circumstances, it is irrelevant that price reductions may have placed "even greater pressure" on Ross-Simmons; the Court has emphatically rejected "the notion that above-cost prices that are below general market levels or the costs of a firms's competitors inflict injury to competition cognizable under the antitrust laws." *Brooke Group*, 509 U.S. at 223.

Second, the Ninth Circuit failed to acknowledge this Court's conclusion that predation schemes are "rarely tried and even more rarely successful." *Matsushita*, 475 U.S. at 589. The Court has described predation schemes as "general[ly] implausib[le]" in the pricing context, *Brooke Group*, 509 U.S. at 227, because they are "by nature speculative" and require defendants to "forgo profits that free competition would offer." *Matsushita*, 475 U.S. at 588. Moreover, even if the defendant achieves monopoly power, it may be unable ever to recoup its losses because "monopoly pricing may breed quick entry by new competitors eager to share in the excess profit." *Id.* at 589.

All the factors cited by the Court that render predatory pricing schemes unlikely to generate profits are equally applicable to predatory buying schemes. Such schemes similarly require the would-be predator to incur short-term

losses based on speculation that it might later recoup its losses by driving down the price of inputs. Success in this endeavor requires that it achieve its pricing power without attracting new competitors eager to obtain inputs at the artificially low prices.[5] Given the improbability that companies would choose to engage in such speculative ventures, there is little danger that extending the *Brooke Group* requirements to predatory buying claims will significantly increase the number of "false negatives."

Moreover, to the extent that a successful predatory buying scheme causes harm, virtually all of the harm will be incurred by the companies that supply the inputs, with consumers suffering only the indirect harms inherent in any anticompetitive scheme. A successful predatory buying scheme will reduce the predator's prices and thus increase his profits, but the scheme is unlikely to have any effect on the prices the predator charges to his customers. So long as the monopsonist is selling into a competitive market (as was true here), any harm to consumers during the recoupment period is likely to be substantially less than the amount they gained during the predatory period. *See* Steven C. Salop, *Anticompetitive Overbuying By Power Buyers*, 72 ANTITRUST L.J. 669 (2005). Review is warranted to determine whether the Ninth Circuit's refusal to apply the *Brooke Group* requirements to predatory buying schemes is appropriate in light of the unlikelihood that such schemes will cause significant harm to consumers.

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[5] We note that in this case, four new mills opened during the alleged predation period. Pet. App. 23a. If new mills were opening during the time that Weyerhaeuser allegedly was driving up the price of alder sawlogs, it seems implausible to contend that there would not have been even greater numbers of new market entrants after Weyerhaeuser began attempts to recoup its losses by driving down the price of alder sawlogs.

Finally, WLF notes that the Fifth Circuit dismissed an antitrust suit raising predatory buying allegations virtually identical to those raised here. The Fifth Circuit held that the plaintiffs could not sustain their allegations in the absence of evidence that the defendant had sold its products for less than cost. *In re Beef Industry Antitrust Litig.*, 907 F.2d 510, 515 (5th Cir. 1990). Review is warranted to resolve the conflict between the Fifth and Ninth Circuit decisions.

III. THE DECISION BELOW INCREASES THE ABILITY OF INEFFICIENT PRODUCERS TO USE THE ANTITRUST LAWS TO PROTECT THEMSELVES FROM COMPETITION

Competition is not always welcomed by all producers, of course; while vigorous competition benefits the public as a whole, it can often harm individual producers and can even drive them out of business. Thus, a producer that is threatened by a rival's aggressive competition may well file a lawsuit claiming that price cuts or increased bids for inputs constitute predatory activity. That producer has an economic incentive to do so whether the activity is predatory or nonpredatory; as *Cargill* recognized in the context of predatory pricing, "[T]he mechanism by which a firm engages in predatory pricing – lowering prices – is the same mechanism by which a firm stimulates competition." *Cargill,* 479 U.S. at 122 n.17. Similarly, raising one's bids for inputs is the mechanism by which a firm both engages in predatory buying and stimulates competition within a buyer market.

A central focus of *Brooke Group* was establishing clear rules of conduct to ensure that antitrust law not be used to impose sanctions on legitimate price cutting. The Court explained that while price cutting "may impose painful losses on its target," that is

> [O]f no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed "for the protection of *competition*, not *competitors*." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

Brooke Group, 509 U.S. at 224. By refusing to apply *Brooke Group* to buyers, the Ninth Circuit is increasing the ability of inefficient producers to use the antitrust laws as a tool to protect themselves from competition from their more efficient rivals. Review is warranted to prevent the antitrust laws from being hijacked in this manner.

Numerous commentators have noticed the tendency of producers to use the antitrust laws as a means of reducing competition. A detailed study of antitrust lawsuits alleging horizontal restraints filed in five federal district courts revealed that a significant percentage of those suits were filed by one of the defendant's competitors, rather than (as one might expect) by the defendant's customers – the group most likely to be harmed by horizontal restraints on trade. Edward A. Snyder and Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551 (1991). Based on their finding that a significant percentage of the cases lacked merit, the authors concluded that misuse of the antitrust laws by those seeking to reduce competition was widespread. *Id.* at 596. *See also* William J. Baumol and Alan S. Blinder, *Economics: Principles and Policy* 425-26 (8th ed. 2000) ("One problem haunting most antitrust litigation . . . is that vigorous competition may look very similar to acts that *undermine* competition. The resulting danger is that the courts will prohibit . . . acts that *appear* to be anticompetitive but really are the opposite.").

Other leading commentators have observed, "Antitrust, whose objective is the preservation of competition, by its very nature lends itself to use as a means to undermine effective competition. This is not merely ironic. It is very dangerous for the workings of our economy." William J. Baumol and Janusz Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. ECON. 248, 252 (1985). Baumol and Ordover recommended establishing bright-line antitrust rules to minimize the danger of misuse of the antitrust laws:

> [O]bscurity and ambiguity are convenient tools for those enterprises on the prowl for opportunities to hobble competition. . . . The potential defendant who cannot judge in advance with any reasonable degree of certainty whether its behavior will afterward be deemed illegal is particularly vulnerable to guerrilla warfare and intimidation into the sort of gentlemanly competitive behavior that is the antithesis of true competition.

Id. at 254.

Brooke Group was a step in the direction of certainty. It provided a safe harbor for all above-cost price competition, thereby providing producers with clear guidance regarding how to compete without running afoul of the antitrust laws. The Ninth Circuit's decision is a giant step backwards. It eliminates all bright-line buying rules for dominant firms and thereby ensures that producers can be browbeaten by their competitors' threats of lawsuits into avoiding vigorous buying competition. Review is warranted to correct this highly anti-competitive result.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

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